UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NBI/2014/040
Order No.:	137 (NBI/2014)
Date:	23 May 2014
Original:	English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DALGAMOUNI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

DECISION ON AN APPLICATION FOR
SUSPENSION OF ACTION

Counsel for the Applicant:
Alexandre Tavadian, OSLA

Counsel for the Respondent:
Stephen Margetts, ALS/OHRM
Sarahi Lim Baro, ALS/OHRM

The Application and Procedural History

1. The Applicant is a Budget Officer at the Regional Service Centre (RSC) in Entebbe, Uganda. She serves at the P4 level on a fixed term appointment.

2. On 16 May 2014, the Applicant filed an application for suspension of action challenging the decision not to extend her fixed-term appointment. The Applicant submits that the decision was made by the Chief of the Regional Service Centre on 24 April 2014, and that she was informed on 5 May 2014. She sought management evaluation of the decision on 16 May 2014.

3. The Application was served on the Respondent on the day it was filed.

4. The Respondent filed his Reply to the Application on 19 May 2014.

5. On the same day, the Registry served the Respondent's Reply on the Applicant and invited any submissions in response to be filed by 1600hrs (Nairobi time) on 20 May 2014. The Applicant did not file any submissions in response to the Respondent's Reply.

Submissions

The Applicant

6. The Applicant submits that the impugned decision is motivated by the "interpersonal difficulties" she and the Chief of the RSC (CRSC) have with each other.

7. On 2 September 2013, the CRSC asked Applicant to sign a document to confirm that a particular post was vacant so that it could be filled. The Applicant declined to

do as she was asked and explained that she did not have the authority to do that as it was a human resource function.

8. Four days later, on 6 September 2013, the Applicant was placed on a Performance Improvement Plan.

9. On 27 November 2013, the CRSC informed her that there was no progress in her performance.

10. On 5 May 2014, the CRSC told the Applicant that her appointment would not be renewed on grounds of unsatisfactory performance. The Applicant was also directed not to act on behalf of RSC-Entebbe and not to respond to any official communication. The Applicant submits that this directive was tantamount to constructive dismissal.

11. The impugned decision is *prima facie* unlawful as per the provisions of ST/AI/2010/5.

12. The Respondent cannot lawfully refuse to extend her appointment for unsatisfactory performance before completing her performance appraisal report and before giving her an opportunity to rebut the final rating which constitutes the basis for the decision.

13. The Respondent has so far only provided the Applicant with negative feedback, but offered no assistance in terms of resources and training to allow her to improve her performance. It kept the Applicant's Unit understaffed which in itself skews any assessment on her performance.

14. The urgency element of the test for suspension of action is met as the Applicant's appointment is due to expire on 31 May 2014.

15. The Applicant's employment and career prospects stand to be irreparably harmed if the impugned decision is not suspended.

The Respondent

16. The Respondent submits that the Application should be dismissed as it does not meet the requirements of the test for injunctive relief under art. 2.2 of the UNDT Statute; specifically, the Applicant has failed to show that the impugned decision is *prima facie* unlawful, that the urgency of the matter is not "self-created" and that the implementation of the impugned decision will cause irreparable harm.

17. The Respondent submits that the provisions of ST/AI/2010/5 (Performance management and development system), particularly sections 10.1 and 10.3, have been properly adhered to.

18. The Respondent submits that the performance appraisal process has not been completed because of the Applicant's own dilatory conduct. The Applicant received and agreed to her workplan in August 2013, but did not enter it on to the INSPIRA system until April 2014. Similarly, a mid-point review discussion was not possible at the correct time because the Applicant failed to initiate the process on the system until May 2014. The Respondent submits that the Applicant cannot use the delays which she has caused to now present the matter as urgent.

19. The only detriment that will fall to the Applicant if the impugned decision is implemented is that of a financial nature; there will be no irreparable harm.

Deliberations

20. Applications for suspension of action are governed by article 2.2 of the Statute of the United Nations Dispute Tribunal ("the Tribunal") and article 13 of the Tribunal's Rules of Procedure.

21. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted.

22. Under art. 13.3 of the UNDT Rules, the Tribunal has five working days from the service of an application on the respondent to consider an application for interim measures.

23. A suspension of action order is, in substance and effect, akin to an *interim* order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining the *status quo* between the parties to an application pending trial. It follows, therefore, that an order for suspension of action cannot be obtained to restore a situation or reverse an allegedly unlawful act which has already been implemented.

24. This remedy is not available in situations where the impugned decision has been implemented. It is well established that, where a contested decision has been fully implemented, suspension of action cannot be granted.[1]

25. In this case, the impugned decision is due to be implemented on 31 May 2014.

26. The Tribunal must therefore consider the Parties' submissions against the test stipulated in art. 2.2 of the Statute and art. 13 of the Rules of Procedure.

27. The Applicant is on a fixed-term appointment. Whereas it is trite law that a fixed term appointment dies a natural death at the end of the period stipulated in the contract, staff members across contractual types are entitled to expect to be treated fairly and accorded the same due process rights.

[1] *See* for example, *Tadonki* UNDT/2009/016; *Applicant* UNDT/2011/158; *Kweka* UNDT/2011/122; *Tiwathia* UNDT/2012/109; *Laurenti* Order No. 243 (NBI/2013).

28. In other words, the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision".[2]

29. While the burden is on the Applicant to show that the Respondent did not properly exercise his discretion, the Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue here.[3]

30. There is ample jurisprudence regarding the grounds upon which a decision not to renew a fixed-term appointment may be found unlawful. In *Koumoin*, the Appeals Tribunal held that, in reviewing a decision not to renew an appointment, it examines "whether the discretion not to renew … was validly exercised".[4] Similarly, it has been held at first instance that:

> [E]ven though the staff member does not have a right to the renewal of his or her contract that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper.[5]

31. On the facts of the present case, the Applicant submits that she has a difficult relationship with the CRSC. She submits that she was asked to sign off on a document clearly outside of her scope of work and responsibilities, and that her refusal to do that was almost immediately met with a Performance Improvement Plan.

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[2] UN Administrative Tribunal Judgment No. 885, *Handelsman* (1998).
[3] See also: *Hepworth v. Secretary-General*, UNDT/2009/003 at para. 10, *Corcoran v. Secretary-General*, UNDT/2009/071 at para. 45, *Berger v. Secretary-General*, UNDT/2011/134 at para. 10, *Chattopadhyay v. Secretary-General*, UNDT/2011/198 at para. 31; *Wang v. Secretary-General*, UNDT/2012/080 at para. 18.
[4] Judgment No. 2011-UNAT-119.
[5] *Azzouni*, Judgment No. UNDT/2010/005, paragraph 39.

32. The Respondent does not refute the fact that the Applicant and her supervisor have a fraught relationship, nor does it address why the Applicant was asked to certify something so clearly outside of ambit of her work.

33. While the Applicant vehemently denies that her performance was unsatisfactory, the Tribunal is not persuaded that much was meaningfully done to address the putative performance shortcomings alleged.

34. The Tribunal therefore finds that the Applicant has made out a case for *prima facie* unlawfulness.

35. As the Applicant's appointment is due to expire on 31 May 2014, the urgency of this Application is obvious. The Respondent's allegation that the Applicant contributed to the urgency by delaying the appraisal of her performance does not affect the timeline with regard to the date of the impugned decision and the imminent date of separation.

36. The Tribunal is similarly not persuaded by the Respondent's argument that the only detriment likely to befall the Applicant in this case, should the impugned decision be found to be properly unlawful, is financial and can therefore be compensated against.

37. This Tribunal has previously held that where an act is found to be *prima facie* unlawful[6]:

> [I]t should not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

[6] *Tadonki* UNDT-2009-016. *See also Corna* Order No. 80(GVA/2010); *Fradin de Bellabre* UNDT-2009-004; *Utkina* UNDT-2009-096.

38. Given the facts of this case, the Tribunal strongly believes that while the Management Evaluation Unit (MEU) carries out its review of the Applicant's request, the Parties should engage in meaningful consultations towards having this matter resolved. In the interest of efficient use of the Tribunal's resources and the expeditious conduct of these (and potentially future) proceedings, the Tribunal pursuant to articles 10.3 of the Statute and 15.1 of the Rules of Procedure, strongly urges the Parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

39. A conducive and productive working relationship between the employer and an employee demands nothing less.

40. It, of course, remains open to the Applicant to have this matter litigated on the merits should the informal efforts to resolve the dispute be unsuccessful.

41. The Application for Suspension of Action is **GRANTED** pending management evaluation.

(signed)
Judge Vinod Boolell
Dated this 23rd day of May 2014

Entered in the Register on this 23rd day of May 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi